

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD SCOTT MIELCAREK,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 264961

Saginaw Circuit Court

LC No. 04-024231-FC

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony, MCL 750.227b, and sentenced to the mandatory term of two years' imprisonment, with 535 days' credit. Defendant was also tried for assault with intent to commit murder, MCL 750.83, but the jury was unable to reach a verdict on that charge. Defendant appeals as of right, and we affirm. This case is being decided without oral argument under MCR 7.214(E).

I. FACTS

On December 4, 2003, defendant was arrested and charged with one count of assault with intent to commit murder and one count of felony-firearm stemming from an altercation with his wife, Danielle Hoffman, on December 2–3, 2003. The two engaged in several heated phone conversations throughout the course of December 2, allegedly regarding Danielle spending time with a male coworker and defendant traveling to Flint to drink with friends, for which Danielle threatened divorce. Danielle left work at 11:07 p.m. on December 2, purchased a six-pack of beer, and consumed five and one-half beers before retiring to bed at approximately 3:30 a.m. on December 3. Though disputed by defendant, Danielle testified that she was awakened approximately two hours later when defendant turned on the bedroom lights and began yelling and swearing at her with accusations that she was cheating on him. Initially she responded nonchalantly, but later, when defendant's anger intensified, she turned to see defendant standing diagonally from her across the bed and pointing a .380 semiautomatic pistol at her head.

Despite defendant's commands to the contrary, Danielle picked up the phone, dialed 911, and was raising the receiver to her face when defendant fired the gun and struck the phone, causing it to splinter into fragments that cut her face. Danielle jumped out of bed, shattered phone in hand, and brushed passed defendant and down the stairs to find another phone and to

leave the house. As she tried to get through the front door, defendant fired another shot which struck the wall by her head and, as she later testified, caused a burning sensation on her left ear. Once outside, Danielle succeeded in calling the police. She ran to several neighbors' homes in search of help and to hide from defendant, who was apparently still in the house. The police arrived after she witnessed defendant leave the house and drive away.

Defendant claimed that the first shot fired was not intended to hit his wife, but was fired at the phone in an attempt to intimidate, and that the second shot was fired at the wall out of frustration and not with the intent to kill, injure, or harm in any way.

Defendant's sole argument on appeal is that trial counsel rendered ineffective assistance by failing to present a defense to the felony-firearm charge. While defendant admits the possibility of inconsistent verdicts in Michigan, he asserts that counsel's performance fell below an objective standard of reasonableness for failure to argue anything regarding felony-firearm in closing argument and that this failure resulted in prejudice as there was a reasonable likelihood that the outcome would have been different but for counsel's failure. We disagree.

II. STANDARD OF REVIEW

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The court must first find facts, which we review for clear error, and then decide whether those facts constituted a violation of the defendant's constitutional right to effective assistance. We review that determination *de novo*. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In the absence of a motion for a new trial or an evidentiary hearing, as in this case, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

III. ANALYSIS

Generally, to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is also denied the effective assistance of counsel if the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra*, 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. Counsel will not be second-guessed on matters of trial strategy. *Bell v Cone*, 535 US 685, 698; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

In *People v Goodin*, 257 Mich App 425; 668 NW2d 392 (2003), the defendant argued that he received ineffective assistance because his counsel failed to argue regarding self-incrimination and comments made by the prosecutor about defendant's prior record. A panel of this Court rejected that argument, reasoning that the issues were meritless because the defendant's right against self-incrimination had not been violated and the prosecutor had not engaged in misconduct. Counsel was not ineffective for failing to raise the meritless issues. *Id.* at 433. In *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000), counsel's failure to object to a jury instruction, because of an omission of language of moral certainty, did not render his assistance constitutionally ineffective because the instruction was proper. Counsel was also not ineffective in failing to introduce speculative evidence. *Id.* at 424-425.

Just as in *Goodin, supra*, and *Snider, supra*, defendant argues that he received ineffective assistance of counsel because counsel failed to make a meritless argument to the jury in closing argument. Our Supreme Court has held that inconsistent verdicts are permissible in Michigan:

It would not be consistent with the legislative purpose in enacting the felony-firearm statute to conclude that it intended that a felony-firearm conviction be set aside . . . in a case where the jury, extending leniency or compromising, failed to convict of the underlying felony, but did convict of felony-firearm. [*People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982).]

Limiting our review to the facts on the record, *Rodriguez, supra*, the evidence shows that trial counsel simply failed to argue that, if defendant lacked intent to murder his wife, he should be acquitted of both assault with intent to commit murder and felony-firearm. That is, counsel failed to make an argument to the jury that, according to our Supreme Court, has no legal merit. In any event, the argument was made (erroneously) to the jury by the prosecutor; defendant merely claims that his counsel failed to emphasize the argument. Failure to make a legally insufficient argument clearly falls within a professional norm, and has not resulted in prejudice to defendant. *Mack, supra*. Counsel acted within professional norms, and defendant has not suffered an unfair outcome; therefore, defendant's constitutional right to effective assistance of counsel has not been violated.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette